

the Administrator. Any claimant adversely affected or aggrieved by a final decision of the Administrator awarding or denying compensation may petition for judicial review within [90] days of the issuance of a final decision of the Administrator. Such petition may only be filed in the United States Court of Appeals for the circuit in which the claimant resides at the time of the issuance of the final order. At the request of labor representatives, the standard of review of such eligibility determinations was changed from the usual arbitrary and capricious standard to a substantial evidence standard.

Sec. 303. Judicial Review of Participants' Assessments. Section 303 now applies to judicial challenges of participants' assessments made by the Administrator or the Asbestos Insurers Commission. The United States Court of Appeals for the District of Columbia Circuit, rather than the United States District Court for the District of Columbia as was provided in S. 1125 as reported, has exclusive jurisdiction over such actions. A petition for review must be filed within 60 days of the final determination giving rise to such action. Defendant participants must file a petition for review within 30 days of the Administrator's final determination (after rehearing), and insurer participants must file a petition for review within 30 days of receiving notice of a final determination.

Sec. 304. Other Judicial Challenges. Section 304 provides that any action challenging the constitutionality of any provision of the Act must be brought in the United States District Court for the District of Columbia. The provision also authorizes direct appeal to the Supreme Court on an expedited basis. An action under this section shall be filed within 60 days after the date of enactment or 60 days after the final action of the Administrator or the Commission giving rise to the action, whichever is later. The District Court and Supreme Court are required to expedite to the greatest possible extent the disposition of the action and appeal.

Sec. 305. In General. As provided in S. 1125 as reported, section 305 also states that no stays of payments into the Fund pending appeal are allowed. In addition, no judicial review other than as set forth in sections 301, 302 and 303 is allowed. Any decision of the federal court finding any part of the FAIR Act to be unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court within 30 days of such ruling.

TITLE IV—MISCELLANEOUS PROVISIONS

The following provisions in Title IV have been amended from S. 1125 as reported.

Sec. 402. Effect on Bankruptcy Laws. Various changes were made to section 402 for clarifications and to address possible constitutional arguments that may affect the ability of the Fund to receive assets from current bankruptcy trusts.

Sec. 403. Effect on Other Laws and Existing Claims.

Asbestos Claims Barred. Section 403(d)(2) is changed to address a variety of unconventional asbestos claims that plaintiffs have asserted directly against both defendant participants and insurer participants in the tort system.

Subsection (d)(6) is added to permit parties to obtain a credit in the event that a court ignores or misapplies the exclusive remedy provisions of the Act, and erroneously awards a judgment in favor of asbestos claimants outside of the federal compensation program.

Initiation of the Fund. Because the new administrative structure and the new funding provisions were amended to ensure that the program is up and running in a matter of months, section 403(d)(5) (p. 211) was deleted from the bill.

Sec. 404. Effect on Insurance and Reinsurance Contracts. Section 404 (Section 406 in the Committee Bill) deals with the effect of the Act on insurance and reinsurance contracts. Section 406 as it came out of Committee accounted for "erosion" of insurance policies that cover not only asbestos liabilities, but also potentially other liabilities. The section established how contributions to the fund by insurers and reinsurers would reduce the limits of existing insurance policies held by the defendant participants.

Erosion. Changes have been made in section 404(a), dealing with erosion of insurance coverage limits, in order to account for the possibility of an early sunset of the Fund. Based upon the assumption that insurers and reinsurers will be required to make payments into the Fund for 27 years after enactment, erosion of the policy limits is deemed to occur at enactment. If the Act sunsets early, however, the insurers may not be required to pay the full amount for which they have been given erosion credit. In order to treat this situation, section 404 has been amended to provide for the restoration of unearned erosion that exists at the time of an early sunset.

Additionally, section 404(a)(2)(B) has been amended to conform the Act to the revised funding structure. The Bill that passed out of Committee deemed certain erosion to occur upon a contingent call because the contingent funding was shared equally by the insurer participants and the defendant participants. Any required contingent funding is now to be required solely of defendants, and therefore no erosion will be deemed to occur upon contingent payments.

Finite Risk Policies Preserved. The Frist/Hatch bill includes a new section 404(d), dealing with finite risk policies. Finite risk policies are non-traditional insurance and reinsurance vehicles that have in recent years been obtained by a relatively small number of defendants in asbestos litigation and some of their insurers in an effort to responsibly manage their asbestos liabilities. These contractual arrangements were specifically designed because traditional asbestos coverage was no longer available after the mid-1980s. Generally, finite risk policies provide coverage with respect to events that occurred in the past and are already known to both parties to the contract. Commercial General Liability insurance provides coverage usually for injuries that may occur in the future.

Because of the unique nature of these kinds of contractual arrangements, it is appropriate that finite risk insurance be excluded from the legislation. This will avoid the danger that participants that have entered into these arrangements could be required to pay twice. Without the exclusion, participants that have entered into finite risk arrangements would be required to pay substantial amounts to the trust fund and also be subject to a potential forfeiture of their rights to funds comprised, in effect, mostly of their own money used to prepay their asbestos liabilities. The participants that have obtained finite risk insurance should not be penalized by the legislation. If the finite risk arrangements are not excluded from the legislation, the insurance carriers issuing the finite risk insurance policies would reap a substantial windfall at the expense of such participants.

Treatment of Other Insurance and Reinsurance Rights or Obligations. A new section 404(e) has been added to specify the effect of the Act on certain reinsurance and insurance claims. Generally, no participant may pursue coverage claims against another participant or captive insurer for required payments to the Fund. Certain insurance assignments are voided. Otherwise, the Act does not affect insurance or reinsurance rights or

obligations unless a person voluntarily pays a claim superseded by the Act or otherwise available limits are deemed eroded.

Sec. 405. Annual Report of the Administrator. The sunset provisions in S. 1125 as reported (section 404(3), p. 214) created an inflexible trigger that could cause the Fund to terminate unnecessarily because of a short-term bulge in claims to the detriment of claimants. Section 405 amends old section 404 to provide a workable alternative to the sunset provisions, giving the Administrator more time and more flexibility, such as through the increased borrowing authority, to deal with a short term aberration in claims and available funding. S. 1125 only gave the Administrator a mere 90 days to correct for short-term liquidity problems. S. 1125 as reported also would have only ensured that 95% of the award amounts owed for the prior year and 95% of eligible claimants be paid prior to sunset. The alternative now in the bill would require that sufficient funds be available to pay all resolved claims in full. Moreover, the bill now makes clear that any debt incurred by the Fund is paid by monies in the Fund and not the United States treasury. These provisions also ensure that the risk that the Fund runs out of money is borne by the participants, providing that, in the event of sunset, a federal cause of action is created and the claimants may file their claims in federal court.

Sec. 406. Rules of Construction Relating to Liability of the United States. This section was previously section 405 in S. 1125 as reported [with one change to conform to the new administrative structure].

Sec. 407. Rules of Construction. Provisions found in section 101(d) of S. 1125 as reported (p. 23) can now be found under new section 407.

Sec. 408. Violations of Environmental and Occupational Health and Safety Requirements. Provisions found in section 222(c) of S. 1125 as reported (p. 171) are now placed in new section 408.

[Sec. 409. Tax Treatment. Currently, insurers have tax-deductible status for reserves originally set aside for payment of asbestos claims. Under S. 1125, these reserves would now be used to pay assessments required by the Act. New section 409 would maintain the tax deductibility of these reserves until such time as the insurer makes payment to the Fund.]

Sec. 410. Nondiscrimination of Health Insurance. New section 410 incorporates a proposed amendment by labor representatives and Democrats that explicitly extends the protections of HIPAA to ensure that claimants cannot be discriminated against for provision of health insurance solely as a result of filing a claim for medical monitoring reimbursement with the Fund.

RESERVATION OF LEADER TIME

The PRESIDING OFFICER. Under the previous order, the leadership time is reserved.

RECOGNITION OF MINORITY LEADER

The PRESIDING OFFICER. The Democratic leader is recognized.

DEBATING ASBESTOS LITIGATIONS REFORM

Mr. DASCHLE. Mr. President, I will address a couple of issues. I am disappointed we have come to debate the asbestos issue under these circumstances. I agree with much of what